

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

NOTICE OF MOTION NO.318 OF 2007
IN
SUIT NO.209 OF 2007

1. Venkateshwar Onkarmal Somani
2. Ramesh Venkateshwar Somani.
3. Rajesh Venkateshwar Somani.
All of Mumbai, Indian Inhabitants,
having their office at Ground floor,
Shreeniwas House, HNazarimal Somani
Marg, Mumbai-400 001.

...Plaintiffs.

Versus

1. Ranganath Basudev Somani.
of Mumbai, Indian Inhabitant,
having his office at 2nd Floor,
Shreeniwas House, HNazarimal Somani
2. Vinay Ramchandra Somani
of Mumbai, Indian Inhabitant,
having his office at 86-A, Marine
Drive, Mumbai.
3. M/s. Kanga & Co.,
a Registered Partnership Firm of
Advocates & Solicitors, having their
office at Readymoney Mansion,
Veer Nariman Road, Mumbai-400 001.

...Defendants.

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Mr.Virag Tulzapurkar, Senior Advocate with Mr.Rahul Dwarkadas and
Ms.Bindi Dave i/b. M/s. Wadia Ghandy & Co. for the Plaintiffs.
Mr.Pravin Samdani, Senior Advocate with Mr.Shyam Mehta, Mr. N.Y.
Dhruva, Mr. Abhishek Munoti and Mr. Prakash Shinde i/b. M/s.

M.Dhruva & Co. for Defendant No.1.

Mr.Cyrus Ardeshir i/b. M/s. Madekar & Co. for Defendant No.2.

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CORAM : DR. D.Y. CHANDRACHUD, J.

December 17, 2007.

JUDGMENT :

The dispute in the case relates to the right, title and interest in 44,666 shares of a Company known by the name of Shreeniwas Cotton Mills Ltd. The Plaintiffs seek a declaration in the suit that the title to and interest in the shares belongs equally to three branches of the Somani family represented respectively by the Plaintiffs, the First Defendant and the Second Defendant. Consequential relief has been sought for the transfer of these shares to the three branches in equal proportion and the First Defendant is sought to be enjoined from claiming any right in respect of two thirds of those shares. The Second Defendant supports the Plaintiff.

2. The Plaintiffs and the First and Second Defendants belong to the Somani Family which primarily is stated to have three branches described in a family settlement as the Somani A, B and C Groups respectively. One of the businesses of the family consisted of a

Textile Mill which belonged to Shreeniwas Cotton Mills Ltd. The Plaintiffs and the First and Second Defendants are according to the Plaintiffs, members of the Somani B-Group. Laxminarayan and Bhagwanbux were brothers. The former had three sons. The Somani B-Group consists of the branch of Onkarmal and Harnarayan who were two of the three sons of Laxminarayan. Shreeniwas Cotton Mills Ltd. was incorporated in 1935. 62.5% of the share capital was controlled by the Bangur Family, while 37.5% was held by the A, B and C Groups of the Somani family. In 1977, the Bangurs held 41%, while the Somanis 20%. In 1977 a settlement was alleged to have been arrived at between the Bangurs and the Somani B-Group under which the latter was to control the Company upon the Bangurs' relinquishing their rights. The Somani B-Group is alleged to have been allotted 9.21% of the holding of the three other Group Companies in lieu of the payments to be made by the Bangurs. By virtue of the settlement, Somani B-Group is alleged to have been absolutely entitled to all rights in respect of 44,666 shares of the Bangurs for which payment at the rate of Rs.101 per share is alleged to have been made. In support of the contention, the Plaintiffs have

relied upon certain letters and documents annexed as Exhibits E to M to the Plaint.

3. In a Company Petition for winding up, Shreeniwas Cotton Mills Ltd. was ordered to be wound up by an order dated 25th July 1994. In 1994, the Somani B-Group is alleged to have propounded a scheme to bring the Company out of liquidation. In a Company Application in that proceeding, the First Defendant filed an affidavit on 3rd October 1994, stating that the Somani Group had arrived at an agreement with the Bangurs whereby the Bangurs had agreed to transfer 44037 shares to the Somani Group. For the purposes of the scheme, a sum of Rs.18 crores was required to be deposited and a Bank Guarantee of Rs.12 crores was required to be furnished for which the Somani B-Group entered into a Memorandum of Understanding with three individuals. Under the MOU an amount of Rs.1 crore was to be advanced to the Somanis. 51% of the shareholding of the Company, including 41% shareholding of the Bangurs was offered as security for the moneys to be provided under the MOU. According to the Plaintiffs, a sum of Rs.1 crore

which was received under the MOU was received by the First Defendant who had been acting on behalf of the Somani B-Group. The Bangurs were paid additional consideration at the rate of Rs.101/- per share for 44666 shares on behalf of the Somani B-Group. On 27th January 1995, 44666 shares of the Company which were received by the Somanis from the Bangurs were deposited with M/s.Kanga & Co., Advocates and Solicitors. Kanga & Company are the Third Defendants.

4. On 4th April 1995, the scheme of arrangement propounded before this Court came to be rejected. In 1998, a suit was filed before the Calcutta High Court by the First Defendant and others for enforcing the rights of the Somani B-Group against the Bangurs for the performance of the remaining part of the settlement. In the Plaint in the suit, there was an assertion that the Bangur Group had made over shares of the Company in favour of the Somani B-Group.

5. On 7th December 2003, the Plaintiffs and the First and Second Defendants propounded another scheme. The Company

Judge rejected the application by an order dated 23rd July 2004. The appeal was allowed by a Division Bench of this Court on 21st March 2005. Against the order of the Division Bench, the First Defendant filed a Special Leave Petition before the Supreme Court in which it was alleged for the first time that the shareholding of the Bangurs which was acquired by the Somani B-Group was by the First Defendant for himself and not on behalf of the Group. Consequently, the case of the Plaintiffs is that in pursuance of the settlement between the Somani B-Group and the Bangurs, the latter handed over their shares in the Company to the Somani B-Group. The shares were purchased from the Bangur Group who executed blank transfer forms which were handed over together with share certificates to the Somani B-Group. These shares are lying with M/s. Kanga & Co., the Third Defendant. According to the Plaintiffs, the First Defendant was representing the Somani B-Group as a member of the family and acted as a trustee on behalf of the Plaintiffs and the Second Defendant. This Court has been informed that on 27th August 2007, the Supreme Court set aside the order of the Division Bench dated 21st March 2005 and the proceedings stand remitted

back to the Company Court. The present suit was instituted in the month of January 2007. Pending the hearing and final disposal of the suit, the relief that has been sought in the Notice of Motion is for freezing of all rights, including the voting right in respect of 44666 shares constituting about 41% of the shareholding of the Company. In the alternative, the relief that has been sought is to permit the Plaintiffs, the First Defendant and the Second Defendant respectively to exercise rights in respect of $\frac{1}{3}^{\text{rd}}$ of the shares each.

6. The foundation of the submissions urged before the Court on behalf of the Plaintiffs is that the documentary material on the record would make it prima facie evident that at all material times, the 44666 shares that form the bone of contention were regarded as having been acquired for the benefit of the Somani B-Group. This documentary material is, according to the Plaintiffs, comprised in three categories: (i) Communication between the Bangurs and the Somani B-Group; (ii) Communications internally within the Somani B-Group; and (iii) Pleadings and affidavits filed in the proceedings before this Court and the Calcutta High Court.

7. At this stage, it becomes necessary to scrutinise the documentary material. The first document upon which reliance has been placed before the Court is the Plaint in the suit instituted before the Calcutta High Court (Civil Suit 425 of 1998). The First Defendant to the present proceedings was the First Plaintiff before the Calcutta High Court. The First Plaintiff to these proceedings was the Third Plaintiff in the Calcutta suit. The Sixth Plaintiff is the Second Defendant to these proceedings. In the Calcutta suit, the pleading is to the effect that Plaintiffs 1 to 8 who are lineal descendants of Onkarmal Somani constituted a separate and independent group within the Somani group and are referred to as the Somani B-Group. In paragraph 6 of the Plaint, there is a reference to the settlement that was arrived at in April 1977 between the Bangur Group and the Somani Group by which the Somani B-Group was to be allotted Shreeniwas Cotton Mills Ltd. The settlement of 1977 is stated in paragraph 12 of the Plaint to have been modified on 7th January 1987 and it is alleged that the Bangur Group made over its shareholding in Shreeniwas Cotton Mills Ltd. in favour of the Somani B-Group. The

Plaint before the Calcutta High Court was verified by the First Defendant himself on 8th October 1998.

8. The next document is a letter written by the mediator, Shri J.P. Maroo, which speaks of the allotment of Shreeniwas Cotton Mills Ltd. for Rs.50 lakhs. Along the same lines is a letter dated 13th April 1979 addressed by the mediator to the First Defendant stating that the controlling interest and management of Shreeniwas Cotton Mills Ltd., was allotted to “your group” for a certain consideration on net worth value basis. Apart from this, there is a letter dated 13th April 1979 and submissions prepared for the meeting by the mediator which speak of the settlement.

9. The second category of documents reflects, according to the Plaintiffs, an internal arrangement between the Somani B-Group. In this category, is a document signed by the father of the First Defendant on 26th April 1980 according to which, upon the partition taking place, the balance after deducting the shares of one of the brothers would be shared in equal proportion of $\frac{1}{3}^{\text{rd}}$ each. The

second document is a letter of the First Defendant dated 15th February 1983 which states that the Company is being managed by a Board of Directors and the B-Group have been looking after the day-to-day management prior to and after April 1977. The next document is a letter dated 24th March 1984 of the father of the First Defendant to the Chairman of the IDBI recording that the Company was opted for by the B-Group of the Somanis in April 1977.

10. The First Defendant filed an affidavit before this Court in Company Petition 642 of 1983 on 3rd October 1994. In paragraph 6 of the affidavit, the First Defendant states thus:

“Ever since its inception the Company has been under the management, control and supervision of Somani Group, who are one of the promoters of the said Company along with Bangur Group of Calcutta. The applicants herein are the members of Somani Group.”

Paragraph 7 of the affidavit sets out that the issued, subscribed and paid up capital of the Company consists inter alia of 1,10,000 fully paid equity shares each of Rs.100/-. Then comes the following statement:

“Out of the aforesaid issued, subscribed and paid up capital of the Company, the Applicants herein along with other members of Somani Group are holding 23931 equity shares of Rs.100/- each amounting to about 21.76% of the paid up capital. Bangur Group is holding about 44037 equity shares amounting to about 40% of the paid up capital. Somani Group has arrived at an arrangement and agreement with Bangur Group whereby Bangur Group has agreed to transfer 44037 equity shares to Somani Group and has agreed to support the Scheme propounded by the Applicants. Thus the Applicants along with other members of Somani family hold and/or control about 61.79% of the total equity capital of the Company.”

On 4th April 1995, the Company Application in support of the scheme was rejected by a Learned Single Judge. The order of the Learned Single Judge, however, recorded as follows :

“According to the Respondents (viz., Plaintiff No.2, Defendant No.1 and Defendant No.2), the Respondents along with the other members of Somani Family have now acquired 44,037 Equity Shares of Rs.100/- each of the company from the members of the Bangur Family and their associate companies at the rate of Rs.101/- per share. However, the said shares have yet not been transferred and registered in the name of the Respondents and other members of Somani Family. The Respondents along with the other members of Somani Family now claim to be the beneficial owners of the said 44,037 Equity Shares of Rs.100/- each and further claim to hold about 61.79% of the total Equity Share Capital in the company.”

M/s.Kanga & Co. Advocates and Solicitors addressed a letter on 12th March 1998 to the Second Plaintiff and to the First and Second Defendants recording that they were holding 56,798 shares of the Company in escrow. The letter of the Third Defendant contains the following statement:

“As discussed at the meeting held in our office on 24th February 1998, with Mr. H.V. Thakkar, the Shares will be delivered to you, upon payment by you or on your behalf, of Rs.5 crores to Mr. H.V. Thakkar representing the Co-promoters. ... We, therefore, confirm that we now held the said 56798 Equity Shares on your account and on your behalf.”

More recently, on 26th October 2007, a letter was addressed by the Third Defendant to the Second Plaintiff recording that 44666 shares were deposited by the First Defendant, the Second Plaintiff and the Second Defendant by a memo dated 27th January 1995. Finally, there is a letter addressed by B.G. Bangur to the First Plaintiff on 13th September 2005 to confirm that the shares of the Company were delivered to the First Defendant representing B-Group.

11. It is on the basis of the aforesaid documentary material that the Plaintiffs have submitted that 44666 shares of the Company were

received by the Soman B-Group in pursuance of the settlement of 1977.

12. The contention of the First Defendant is that (i) The settlement as pleaded in paragraph 6.3 of the Plaint did not contemplate any payment for the acquisition of the shares of Shreeniwas Cotton Mills Ltd. The Bangurs were to go out of management of the Company and the Somanis would be given 9.21% of the holdings in three Companies as security for the payment of Rs. 1.98 crores to the Somanis; (ii) The defence in the reply by the First Defendant is that the document of 26th April 1980 (Exhibit K) was never implemented; (iii) The settlement of 1977 is alleged, in the Plaint, to have been modified in 1987. The First Defendant's letter dated 15th February 1983 would show that the Bangurs had not implemented the settlement as of the date of the letter. In so far as the modification of 1987 was concerned (Exhibit N), Shreeniwas Cotton Mills Ltd., was not a part thereof; (iv) The shares were acquired by the First Defendant in his personal capacity in August 1994; (v) On 18th May 1984 the Third Plaintiff had in a letter spoken

of the unpredictable fate of the Company and that the interest of the family would lie in each partner looking after his own interest. The Third Plaintiff stated that he did not wish to continue in Shreeniwas Cotton Mills Ltd., after it was restarted and even the First Plaintiff would consider remaining in the Company only if the total charge and responsibility was given to him; (vi) The shares were purchased by the First Defendant in the name of Onkarmal & Co. of which Basudev Somani HUF was the proprietor. The First Defendant paid the entire consideration of Rs. 44.81 lakhs from his mother's proprietary concern and the shares were continuously shown in the Income Tax Returns of the Basudev Somani HUF since the year of acquisition until date. In the circumstances, it has been submitted that the Plaintiffs have failed to make out a case that they have any interest in the shares; the shares have not been given under the settlement with Bangurs. Any injunction, it is urged, would defeat the rights of the First Defendant in the proposed Company Application and the consequence would be to defeat his rights.

13. In considering the merits of the rival submissions that were

urged on behalf of the parties, it must, at the outset, be noted that until July 2005 when the First Defendant sought to assert a personal entitlement to the shares, his consistent case in pleadings and on affidavit was to the effect that the shares have been acquired by the Somani B-Group from the Bangurs. The suit before the Calcutta High Court contained a specific reference in paragraph 6 of the Plaint to the settlement of April 1977 between the Bangurs and the Somani B-Group in the following terms:

“Several negotiations and discussions were held between the members and representatives of the Bangur Group and members and representatives of the Somani A Group, Somani B Group and Somani C Group and thereafter, in or about the second week of April 1977, a settlement was arrived at, inter alia, between the Bangur Group and the Somani B Group in relation to the management and affairs of the businesses and the companies referred to hereinabove which provided, inter alia as follows :

(i) The Somani B Group would be allotted Shreeniwas Cotton Mills Ltd.”

Paragraph 11 of the Plaint makes a reference to partial modification of the settlement of 1977 in a writing executed on 7th January 1987. In paragraph 12, the case which has been set up is that:

“Subsequent to the said partial modification dated January

7, 1987 to the said agreement made in April 1977, the Bangur Group made over its shareholding in Shreeniwas Cotton Mills Ltd. in favour of Somani B-Group. (emphasis supplied)

Now it is important to note, at this stage, that 44666 shares of Shreeniwas Cotton Mills Ltd. are not the subject matter of the Calcutta suit since according to the Plaintiff the suit seeks a specific performance of the agreements of 1977 and 1987 to the extent to which they remained to be implemented. Prima facie, at this stage, the First Defendant who has verified the Plaint in the Calcutta suit cannot be heard to contend either that no settlement took place in relation to the 44,666 shares or that the 44,666 shares were not intended for the benefit of the Somani B-Group.

14. Besides the pleadings in the Calcutta suit, the First Defendant filed an affidavit on 3rd October 1994 before this Court in Company Petition 642 of 1983 in support of an application for propounding a scheme of compromise and arrangement between the Company, its creditors and shareholders. In the affidavit filed in support of the application, the First Defendant reiterated that the Somani Group has arrived at an arrangement and agreement with the

Bangur Group whereby the Bangur Group agreed to transfer 44037 equity shares to the Somani Group. In paragraph 16 of the affidavit in support of the Company Application, the First Defendant stated that the Bangur Group had agreed to sell 40% of its equity holdings in the Company to the Applicant Group, as a result of which, the Somani Group would hold 61.7% of the shares in the Company.

15. The First Defendant claims in the reply filed in these proceedings that an amount of Rs. 44.81 lakhs was paid to the Bangurs for the acquisition of 44666 shares between 24th August 1994 and 27th September 1994 (paragraph 6(l) of the affidavit in reply). The monies are alleged to have been paid on behalf of a firm called Onkarmal & Co. from a proprietary concern belonging to the First Defendant's mother. His case is that the acquisition is de hors the settlement with the Bangurs. Prima facie, at this stage, it is significant that even after the aforesaid payment, the First Defendant confirmed that the acquisition was for the benefit of the B-Group. The affidavit before this Court, it must be noted, was filed on 3rd October 1994. The Plaint before the Calcutta High Court was verified by the

First Defendant on 8th October 1998. Payments are alleged to have been made between 24th August and 27th September 1994. Hence even after the payments allegedly made, the First Defendant stated before the Calcutta High Court and in this Court that the shareholding of the Bangurs was transferred to the Somani B group. Consequently, prima facie it is evident from the conduct of the First Defendant that the acquisition of 44666 shares has been treated and regarded as an acquisition for the benefit of the Somani B-Group. On 11th October 1994, the Second Plaintiff together with the First and Second Defendants entered into an MOU in which these three parties are jointly and severally referred as “Mr. Somani” and to include “all shareholders of their group holding about 51% shares in Shreeniwas Cotton Mills Ltd.”. The MOU inter alia contains the following recital :

“Mr.Somani holds at least 51% of the issued equity capital of the Company in his name and/or in the name of his various associates and/or members of Somani family and/or in the names of private limited companies wholly owned by members of the Somani family and warrant to offer at least 51% shares free from any lien or encumbrances and further that the signatories to this MOU as the party of first part are entitled and authorised to offer them at their will.”

These shares were deposited with the Third Defendant, M/s.Kanga & Co., and in their letter dated 12th March 1998, the Third Defendant recorded holding the shares “on your account and on your behalf”. The letter was addressed to the Second Plaintiff and to the First and Second Defendants. The letter of the Third Defendant dated 26^h October 2007 similarly adverts to the deposit of 44666 shares by the Second Plaintiff and by the First and Second Defendants. During the pendency of these proceedings, a letter has been addressed by the First Defendant to the Third Defendant advertizing to his letter dated 13th March 2007 stating that the shares were held by him and were not to be delivered to any one else except the First Defendant. This aspect of the matter would need further deliberation at the trial of the suit. At the present stage, the material on the record would prima facie substantiate the contention of the Plaintiffs that until July 2005 when the First Defendant changed his position, the 44666 shares were intended to be and regarded as being acquired not for the First Defendant personally, but for the benefit of the B-Group. The contention of the First Defendant that the settlement of 1977 did not contemplate any payment for the shares may not prima facie be

correct. The confirmatory letters of the mediator, Shri J.P. Maroo dated 16th April 1977 and 28th July 1978 (Exh.E and G to the Plaint) speak of the valuation of Shreeniwas Cotton Mills being determined at Rs.50 lakhs. Hence, the submission that the acquisition was de hors the settlement, by the First Defendant in his personal capacity cannot prima facie be accepted. There is prima facie merit in the submission which has been urged on behalf of the Plaintiffs that even if the First Defendant paid for the shares, he would at the highest be entitled to a contribution from the other two members of the Group, namely, the Plaintiffs and the Second Defendant respectively. The First Defendant may, at the trial of the suit, have an explanation for the admissions contained in the pleadings before the Calcutta High Court and before this Court. At this stage, the First Defendant cannot be allowed to assert a position to the contrary, particularly because that is not consistent with his own conduct.

16. In the circumstances, an interim protective order in relation to the 44666 shares would be warranted. The First Defendant cannot be permitted to deal with the shares on the basis that they represent

his personal entitlement. A prima facie case has been made out. The balance of convenience requires the passing of a freezing order on the shares. Irreparable prejudice would be caused to the Plaintiffs if the First Defendant is allowed to deal in the shares and exercise voting rights on the basis that they constitute his personal entitlement. There shall accordingly be an ad-interim order in terms of prayer clause (b) as amended which reads as follows :

“(d) pending the hearing and final disposal of the captioned suit, this Hon'ble Court be pleased to direct freezing of all rights, including in particular the voting rights, in respect of the 44,666 shares, constituting about 41% of the shareholding of Shree Niwas Cotton Mills Limited (i.e. the Suit Shares, more particularly described in the schedule at Exhibit “A” to the Plaint).”

The Motion is made returnable on 28th January 2008. All observations contained in this order are only confined to the disposal of the application for ad-interim relief. Parties to complete the pleadings in the meantime.

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